United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1347 B

P/S

In the United States Court of Appeals for the Second Circuit

No. 74-1347

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORDARO,

Plaintiff-Appellant,

-against-

RICHARD H. LUSARDI and the UNITED STATES OF AMERICA,

72 Civ. 3644 (MIG)

Defendants and Third-Party Plaintiffs,

-against-

CITY OF POUGHKEEPSIE,

Third-Party Defendant.

Appeal from a Judgment Dismissing Complaint entered in the United States District Court for the Southern District

BRIEF FOR APPELLANT

MARSHALL L. BRENNER, ESQ.
Attorney for Plaintiff-Appellant
Office and P. O. Address
35 Market Street
Poughkeepsie, New York
Tel. (914) 452 2022

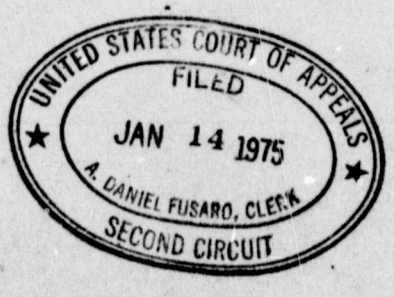


TABLE OF CONTENTS

TABLE FOR AUTHORITIES

Miscellaneous

ISSUES PRESENTED FOR REVIEW

1. Was the Plaintiff free from contributory negligence?

2. Did the Defendants' gross negligence reduce the Plaintiff's burden of proof of freedom from contributory negligence to the vanishing point?

3. Should the Plaintiff's difficulty with the English language be used against him in the trial below?

STATEMENT OF THE CASE

This is an action for personal injuries sustained by the Plaintiff from a collision on November 7,1969 in Poughkeepsie, New York between an automobile driven by the Plaintiff and an automobile operated by the Defendant, Richard H. Lusardi, and owned by his employer, The National Park Service of the Department of the Interior, an agency of the United States.

The action was begun in the Dutchess County Supreme Court on July 12, 1972, by the Service of a Summons with Notice upon the Defendant. On August 25, 1972, the action was removed from the State Court to the United States District Court for the Southern District of New York pursuant to 28 U. S. C., Section 1442 (a) (3), 1446 and 2679 (d). Thereafter the Defendant, the United States of America, instituted a Third-Party action against the City of Poughkeepsie. The action was tried before the United States District Court of the Southern District of New York, the Honorable Murray I. Gurfein presiding, without a jury, on the Stipulated issue of liability only by Decision dated January 7, 1974, District Judge Gurfein concluded that the Defendant, the United States, was negligent, however, so was the Plaintiff contributorially negligent and therefore verdict was granted for the Defendant, the United States. From the Order entered on January 10, 1974, the Plaintiff, FRANCESCO CORDARO, appeals.

FACTS

On November 7, 1969, between the hours of 4:30 p.m. and 4:45 p.m., the Plaintiff, Francesco Cordaro, left his house at 46 Lent Street, City of Poughkeepsie, New York, to pick up his wife from work. He proceeded south on Bement Street in the City of Poughkeepsie at the approximate speed of between 15 to 20 miles per hour. (47-8).* The Plaintiff proceeded three (3) blocks south on Bement until he reached the intersection of Bement Street and Harrison Street. While continuing on Bement Street, just prior to entering the intersection with Harrison Street, the Plaintiff looked left and right. (47-8+22). The Plaintiff was proceeding cautiously as he approached the intersection. (47-22). The Plaintiff then stated that suddenly and without notice the Defendant's vehicle, proceeding west on Harrison Street, failed to stop at the stop sign at the intersection of Harrison Street and Bement Street, suddenly entering the intersection and colliding with and striking the Plaintiff's vehicle. (47-21). The Plaintiff stated that he heard no horn, signal or warning device from the Defendant's vehicle immediately preceding the collision. Had the Defendant stopped his vehicle at the stop sign, the Plaintiff and Defendant would both have seen each other's vehicle. (47-25). Upon the Defendant failing to stop his vehicle at the stop sign and entering the intersection at a rapid rate of speed, the Plaintiff hit his

* Figures in parentheses refer to pages of the Appendix.

brakes in an attempt to avoid a collision between the two vehicles. (47-25+62). In furthering to avoid a collision, the Plaintiff attempted to turn the wheel of his vehicle so as to avoid the inevitable collision which ensued. (47-48).

The driver of the Government vehicle, Richard H. Lusardi, testified that he was returning from the Dutchess County Highway Department to the Vanderbilt Mansion, where he was employed, traveling west on Harrison Street in the City of Poughkeepsie.(47-101+102). Mr. Lusardi testified that he failed to observe the stop sign on Harrison Street at the intersection with Bement Street, and at no time applied his brakes as he entered that said intersection. (47-107). Lusardi stated that he did not apply his brakes upon entering the intersection because he thought it was one continuous street.(47-108). Lusardi did state that as he approached the intersection he saw a light or beam of light coming from his right.(47-108). Lusardi further testified that he did not observe any signs including both the stop sign and parking signs which were on the right side of Harrison Street as he was proceeding west. (47-123).Mr. Lusardi testified that at the time of the accident it had been raining and was dark.(47-104). He further stated that he was not familiar with the streets in the City of Poughkeepsie(47-126) and that this was the

first time that he had driven to and return from the Dutchess County Department of Highways in the City of Poughkeepsie.(47-124).

ARGUMENT

POINT I

THE VERDICT BELOW WAS AGAINST THE WEIGHT OF THE EVIDENCE, IN THAT THE PLAINTIFF WAS FREE FROM CONTRIBUTORY NEGLIGENCE.

It is grounds for a new trial, in an action involving a motor vehicle, that the verdict is contrary to the evidence or the weight thereof, or that the evidence is insufficient to justify the verdict. Three New York Auto Law Section 2276 and numerous cases cited therein. In our immediate case, the Plaintiff, Francesco Cordaro, was free from contributory negligence while the Defendants, were negligent, particularly the Defendant, Richard H. Lusardi and the United States of America. The Honorable Murray I. Gurfein, District Judge, in his findings after trial of this matter, found the Defendants Lusardi and the United States negligent, and from that part of the judgment, the Plaintiff appeals. Insofar as the Judge's conclusion that the Plaintiff was contributorially negligent, the evidence presented before the Court is insufficient to result in such a conclusion.

In order to recover in a negligence action, it must appear that the Plaintiff exercised due care for his own safety. 41 N. Y. Jur. Section 56; Belotte and Nardone, Inc. v. Dunn Garden Apartments, Inc. 14 App. Div. 2d 602.

The Plaintiff must use for his own protection the care which a reasonable prudent and vigilant man would use under similar circumstances. Shindler v. Sullivan County Light and Power Corp. 213 App. Div. 71 aff'd. 241 N. Y. 571. It is submitted that the Plaintiff, Francesco Cordaro, acted as "a reasonably prudent and vigilant man would do under similar circumstances." Ordinary care for one's own safety does not require a person to anticipate another's negligence. Curley v. Electric Vehicle Co. 68 App. Div. 18. Here, the Plaintiff was not required to anticipate the negligence of the Defendant, Lusardi and United States, by his failure to observe a stop sign located at the intersection of Harrison Street with Bement Street. The negligence of the Defendant was one of "gross negligence." The Defendant owed a duty to the Plaintiff and other people so situated to observe the stop sign at said intersection and to operate his vehicle in a prudent and careful manner and to observe the rules of the road. It is a well-established rule that an individual to whom a duty of care is owed has a right to assume that it will be performed. Baker v. Close, 204 N. Y. 92; Jessen v. J. L. Kesner, Co., 159 App. Div. 898, aff'd. 215 N. Y. 639; Buschner v. New York Transportation Co., 106 App. Div. 493.

To bar the recovery for the negligence of another, a Plaintiff's negligence must not only be a contributing cause,

but also must be approximate, and not the remote, cause of the injury. Riter v. Syracuse Rapid Transit Railroad Co., 171 N. Y. 139. In our immediate case, the Plaintiff was not contributorially negligent nor was his actions a proximate cause of the injuries sustained. The Plaintiff has the burden of proving his freedom from contributory negligence by a fair preponderance of the evidence. 41 N. Y. Jur., Negligence Section 117; Thies v. Thomas, 77 N. Y. Supp. 276. A careful reading of the entire transcript of the trial in this matter indicates the Plaintiff has proved his freedom from contributory negligence by a fair preponderance of the evidence. The Court in its finding No. 25 stated Plaintiff: "failed to look to the left." Throughout the Plaintiff's testimony, the Plaintiff indicated in response to questions of the Court and counsel that the Plaintiff looked to both the left and right as he approached the intersection of Bement Street and Harrison Street. (Two such instances during Plaintiff's testimony appear at page 47-8 and 47-22).

A motorist, on reaching an intersection, has the right to assume that an approaching motorist will give proper warning signals where necessary, (Lee v. City Brewing Corp., 279 N. Y. 380; Shuman v. Hall, 246 N. Y. 51) and also that they will obey stop signs or signs requiring them to yield the right of way. (Walker v. State, 187 Misc. 1034; Catopano v. Giordano, 144 N. Y. Supp. 2d 73). One New York

Auto Law Section 411. In the case at bar, the Defendant, Lusardi and United States, owed the Plaintiff, Cordaro, the right to assume that the Defendants would obey stop signs such as existed at the intersection of Harrison Street and Bement Street. The Defendants' failure to observe that stop sign constituted gross negligence on their part and was the initial link in a chain of events started due to their negligence. One guilty of gross negligence may not complain that his victim did not use the highest degree of caution to avoid or to minimize the consequences of his own fault. Walter v. State of New York, 187 Misc. 1034; Goschar v. Bauer, 13 N. Y. Supp. 2d 328, 333. Such is the case before this Court. The Defendants may not complain that the Plaintiff did not use the highest degree of caution. So long as the Plaintiff acted as any other reasonable prudent man thrown into the same set of circumstances, the Plaintiff must be found free from contributory negligence. A motorist operating his vehicle at an intersection need not anticipate that the persons in charge of another vehicle will violate the law or rules of the road, (Flynn v. Superina, 22 App. Div. 2d 943, aff'd. 16 N. Y. 2d 1033; Walter v. State, supra) and, unless and until the contrary has become apparent, he is entitled to assume, and to act on the assumption, that others will observe the law and the rules of the road (Sansone v. Myer, 10 Misc. 2d 1060; Shuman v. Hall, supra; Boylan v. Whitehouse, 229 App. Div. 372;

Walter v. State, supra), exercise due care (Ward v. Clark, 232 N. Y. 195), operate their vehicle with common skill and prudence (Ward v. Clark, supra) and at a reasonable, proper and lawful speed (Lee v. City Brewing Corp., supra). One New York Auto Law Section 411. The chain of events which led to the accident, were of a sudden nature and due solely to the gross negligence of the Defendants brought about as a result of their failure to observe the law and the rules of the road and to exercise due care in the operation of their vehicle with common skill and prudence and at a reasonable, proper and lawful speed, in that they proceeded at too fast a rate of speed on a city street, which they were unfamiliar with at a rate of speed excessive under the circumstances then and there existing, and without regard for observing stop signs controlling the traffic in the direction in which they were operating. Where a chain of events has been started, due to the negligence of the driver of an automobile, here the Defendant, he may be held liable for all mishaps which are properly the proximate result of his improper conduct. One New York Auto Law Section 485 and cases cited therein. The negligence of the Defendant brought about the result of the damage to the Plaintiff's vehicle and the resulting physical injuries sustained by the Plaintiff. The operator of a motor vehicle is liable for injuries proximally caused by his negligence in the operation of the vehicle at a crossing or intersection.

One New York Auto Law Section 516; Ganly v. Steel Storage and Trucking Corp., 259 N. Y. 396.

While the Plaintiff has the burden of showing by a fair preponderance of the evidence that he is free from contributory negligence, there is a general softening of the rigidities of the doctrine of contributory negligence in New York. Wartels v. County Asphalt, 29 N. Y. 2d 372, 379. In addition to that softening of the doctrine, the more dangerous condition created by the negligence of a Defendant reduces the Plaintiff's burden of proof as to his freedom from contributory negligence to the vanishing point. As stated in Wartels v. County Asphalt, Inc., supra:

> "With respect to Plaintiff's burden of proving himself free from contributory negligence, the highly dangerous condition created by a negligence in an excessive degree which posed a sudden, not to be anticipated peril, reduced Plaintiff's burden of proof to the vanishing point."

Thus it can be seen in our immediate case that the Plaintiff, Francesco Cordaro, has shown to the Court his freedom from contributory negligence. His testimony indicates that upon entering the intersection he looked in both directions and proceeded carefully. The difficulties that the Plaintiff, Francesco Cordaro, has with the English language, which was recognized by the Court throughout

the trial, should not be used against the Plaintiff. Throughout the trial, the Court acknowledged the Plaintiff's language difficulty and cautioned the Defendant's counsel to be aware of same. At times during his testimony, the Plaintiff, out of frustration, would attempt to answer the questions asked in the best manner that he can possible do considering his language difficulty, and when the Court or opposing counsel seemed to harp upon the issue as if to indicate that they can not understand the Plaintiff, the Plaintiff would become frustrated and ask the Court in his limited English what do you expect of me, I am trying my best, I do not know how else to put it, etc. Many times, the Plaintiff would say I do not know, however, this would be used when the Plaintiff became frustrated in that it appeared that the Defendant's counsel could not understand what the Plaintiff was saying. That term did not mean that the Plaintiff was not aware of what he was saying to be the truth, but rather that he had expressed himself to the best of his ability and didnot know what further he could do to make the Court and Defendant's counsel understand. Throughout the Plaintiff's testimony, he indicated that he looked to the left and to the right as he approached the intersection of Bement and Harrison Streets. The only finding of the Court below sustaining its conclusion that the Plaintiff was contributorially negligent, was that the Plaintiff failed

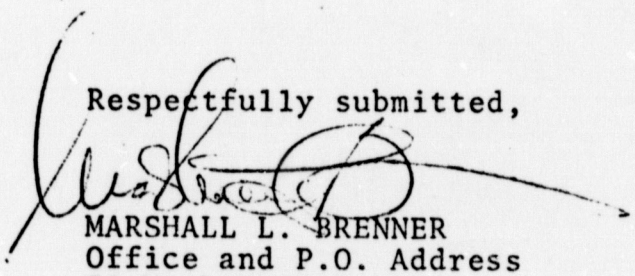
to look to his left, although he knew it was a dangerous intersection. The testimony below clearly illustrates that the Plaintiff proceeded cautiously as he entered the intersection. He further testified that he looked to the left and to the right as he did so. The gross negligence of the Defendant in its operation of its vehicle, that is, failing to observe the stop sign controlling its direction of traffic, reduced the Plaintiff's burden of showing his freedom from contributory negligence to the vanishing point. That, in conjunction with the holding in Wartels v. County Asphalt, Inc. supra, to the effect that there is a general softening of the rigidities of the doctrine of contributory negligence in New York, are sufficient to show that the verdict of the Plaintiff's contributory negligence was against the weight of the evidence and contrary to law in the State of New York.

CONCLUSION

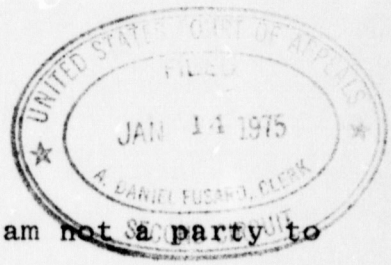
The judgment entered on January 10, 1974 by the United States District Court for the Southern District should be reversed. Judgment should be granted for the Plaintiff on the issue of liability and the Plaintiff's freedom from contributory negligence, or, in the alternative, for a new trial.

Dated: December 27, 1974

Respectfully submitted,



MARSHALL L. BRENNER
Office and P.O. Address
35 Market Street
Poughkeepsie, New York
Tel. (914) 452 2022
Attorney for Appellant



STATE OF NEW YORK)

COUNTY OF DUTCHESS) ss.:

KAREN J. BOEHM, being sworn says: I am not a party to the action, am over the age of 18 and reside at Wappingers Falls, New York. On January 14, 1975, I served Two copies of the Brief and one copy of the Appendix upon PAUL J. CURRAN, United States Attorney for the Southern District of New York, attorney for the Defendant-Appellee in this action, and upon ROBERT D. DIETZ, Corporation Counsel of the City of Poughkeepsie, attorney for the Third Party Defendant in this action, by mailing the same to each of them in the U.S. Post Office of the State of New York, in a sealed envelope with postage prepaid thereon, addressed to the said attorneys at their respective last known addresses at United States Courthouse, Foley Square, New York, New York 10007 and the Municipal Building, Poughkeepsie, New York 12601.

Karen J. Boehm

KAREN J. BOEHM

Sworn to before me this
14th day of January, 1975.

Chester H. Gordon

Notary Public

CHESTER H. GORDON
NOTARY PUBLIC, STATE OF NEW YORK
RESIDING IN DUTCHESS COUNTY
COMMISSION EXPIRES MARCH 30, 19 76

LAW OFFICES
MARSHALL L. BRENNER &
CHESTER H. GORDON
35 MARKET STREET
POUGHKEEPSIE, N. Y. 12601

DOCKET
No. 74-1347 *Year 19* 74

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FRANCESCO CORDARO, Plaintiff-Appellant,

-against-

RICHARD H. LUSARDI and UNITED STATES Defendants-Appellees and Third Party Appellants,

-against-

CITY OF POUGHKEEPSIE, Third Party Defendant-Appellee

AFFIDAVIT OF SERVICE

MARSHALL L. BRENNER &
CHESTER H. GORDON
Attorneys for Plaintiff-Appellant

35 MARKET STREET
POUGHKEEPSIE, NEW YORK 12601
(914) 452-2022

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

.....

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within named court on* *19*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on* *19* *, at* *M.*

Dated:

MARSHALL L. BRENNER &
CHESTER H. GORDON

Attorneys for

35 MARKET STREET
POUGHKEEPSIE, NEW YORK 12601

To:

Attorney(s) for